

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

In re:

PENNY NEASE ALAWAT

Debtor

No. 02-12742
Chapter 7

DONALD GENE WITHROW,

Plaintiff

v.

Adversary Proceeding
No. 03-1134

PENNY NEASE ALAWAT,

Defendant

MEMORANDUM

Appearances: Frank B. Perry, Ringgold, Georgia, Attorney for Plaintiff

Jerrold D. Farinash & Shannon G. Searce, Kennedy, Koontz &
Farinash, Chattanooga, Tennessee, Attorneys for Defendant

R. Thomas Stinnett, United States Bankruptcy Judge

The plaintiff is the debtor's ex-husband. He brought this suit against the debtor to revoke the discharge of her debts entirely or to except particular debts from the discharge. This memorandum deals with the debtor's motion for summary judgment. The court can grant summary judgment only if there is no genuine issue of material fact and based on the undisputed facts, the law entitles the defendant to judgment in her favor. Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56(c).

§ 523(a)(15)

The complaint includes a claim by the plaintiff that certain debts are non-dischargeable under bankruptcy code § 523(a)(15). 11 U.S.C. § 523(a)(15). Section 523(a)(15) and § 523(a)(5) apply to similar kinds of debts. Section 523(a)(5) provides an exception from discharge for divorce, separation, and child support obligations that are actually in the nature of support. 11 U.S.C. § 523(a)(5). The bankruptcy rules and statutes do not set a deadline for filing a complaint under § 523(a)(5), and the state courts have jurisdiction to decide dischargeability under § 523(a)(5). 11 U.S.C. § 523(a)(5) & § 523(c); *Rosenbaum v. Cummings (In re Rosenbaum)*, 150 B.R. 994 (E. D. Tenn. 1993). Section 523(a)(15) provides an exception from discharge for divorce and separation debts that do not come within § 523(a)(5). It requires the court to apply a balancing test to decide whether the debt should be excepted from discharge. 11 U.S.C. § 523(a)(15). A complaint under § 523(a)(15) can be filed only in the bankruptcy court, and there is a filing deadline. 11 U.S.C. § 523(c). The filing deadline is the basis of the debtor's motion for summary judgment. The plaintiff filed the complaint after the deadline, but the complaint alleges that (1) the plaintiff did not receive the formal, mailed notice of the debtor's bankruptcy case because his address was incorrectly listed in the schedules filed by the debtor, and (2) the plaintiff did not have actual notice of the bankruptcy case until October 2002, after the deadline for filing a complaint. The argument is that the deadline can not be applied to bar the plaintiff's complaint because that would deprive him of due process as guaranteed by the United States Constitution. U. S. Const., Amend. 5. The debtor's motion for summary judgment is based on

evidence that the plaintiff had actual knowledge of the debtor's bankruptcy long before the complaint deadline passed.

In this regard, the complaint alleges that the plaintiff and the debtor were both liable on a debt to Bowater Employees Credit Union that was secured by a car, the divorce court awarded the car to the debtor and ordered her to pay the secured debt and hold the plaintiff harmless, the debtor failed to pay the debt, the credit union obtained a judgment against the plaintiff, and the plaintiff has been forced to pay the debt. The debtor's motion for summary judgment includes an affidavit from an employee of Bowater Employees Credit Union. She states that she talked with the plaintiff several times regarding the debtor's bankruptcy filing. Furthermore, she attempted to give the plaintiff some direction as to actions he might take, including the filing of a proof of claim. Finally, she had several of these conversations before June 20, 2002. The debtor filed her bankruptcy case on May 1, 2002, and the last date to file a complaint under § 523(a)(15) was August 6, 2002..

The plaintiff has not filed a response to the motion for summary judgment. On the debtor's side, the court has evidence that the plaintiff had notice of the bankruptcy in plenty of time to discover the complaint deadline and file a complaint before the time expired. On the plaintiff's side, there is no contradictory evidence. Of course, the complaint alleges that the debtor did not receive notice of the bankruptcy case in time to file a complaint before the deadline, but the allegations of the complaint are not evidence that creates a genuine issue of material fact. Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56(c); *HDM Flugservice GmbH v. Parker Hannifin Corp.*, 332 F.3d 1025 (6th Cir. 2003); *Thompson v. Ashe*, 250 F.3d 399 (6th Cir. 2001). As a result, the court must conclude that the plaintiff had actual notice of the debtor's bankruptcy case in time to discover the complaint deadline and file a complaint or a request for an extension of the deadline before the deadline passed. Fed. R. Bankr. P. 4007(c). In light of the plaintiff's actual knowledge of the debtor's bankruptcy case long before the complaint deadline, the court can apply the deadline to bar the plaintiff's cause of action under § 523(a)(15) without violating the plaintiff's right to due process. *Jersey Limited Partnership v. Medaglia*

(*In re Medaglia*), 52 F.3d 451 (2d Cir. 1995); *Rowe v. Steinberg*, 253 B.R. 524 (E. D. Mich. 2000); *Dollinger v. Poskanzer (In re Poskanzer)*, 146 B.R. 125 (D. N. J. 1992); *In re Kmart Corp.*, 381 F.3d 709 (7th Cir. 2004). The court will grant summary judgment to the debtor with regard to the plaintiff's claim under § 523(a)(15).

§ 727(d)(1)

The complaint alleges that the debtor's discharge should be revoked because she obtained the discharge by fraud by making several untrue statements in the bankruptcy schedules or the statement of financial affairs. 11 U.S.C. § 727(d)(1). The debtor's motion for summary judgment deals with part of the plaintiff's claim that the debtor's discharge should be revoked. One of the allegedly untrue statements was the valuation of the debtor's home, which had been the marital home of the plaintiff and the defendant. The complaint alleges that the debtor valued the home at \$113,400 dollars in the bankruptcy case, but she had valued it at \$120,000 in the divorce proceedings about a year earlier, the tax appraisal was \$129,800, and she told the plaintiff that the property had been appraised for \$160,000. The brief in support of the debtor's motion for summary judgment asserts that there was no appraisal for \$160,000. The debtor did not file an affidavit to support this statement. Furthermore, even if the statement is true, it does not entitle the debtor to summary judgment. The allegation that the home was undervalued does not depend entirely on the existence of a \$160,000 appraisal. Likewise, the allegation of intent to deceive does not depend on the allegation that the debtor valued the property at \$113,400 when she knew it had been appraised at \$160,000. The complaint relies on other evidence to support the alleged undervaluation. The plaintiff may have a hard time proving an intentional undervaluation for the purpose of misleading the court, the trustee, or creditors. Nevertheless, there are genuine issues of material fact on this question even if there never has been an appraisal for \$160,000.

§ 523(a)(5)

The debtor's motion and brief are unclear as to whether she is asking for summary judgment under § 523(a)(5). The brief makes a bare assertion that the debts in question are not of the kinds described in § 523(a)(5) because they are not designated as alimony, maintenance, or support. This is not sufficient to show that there is no genuine issue of material fact, especially since a debt may be excepted from discharge under § 523(a)(5) even if it is not designated as alimony, maintenance, or support. *Crawford v. Osborne (In re Osborne)*, 262 B.R. 435 (Bankr. E. D. Tenn. 2001).

This memorandum constitutes the court's findings of fact and conclusions of law. Fed. R. Bankr. P. 7052.

ENTER:

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
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ORDER

In accordance with the court's memorandum opinion entered this date,

IT IS ORDERED that the defendant is hereby granted summary judgment in her favor and against the plaintiff on his demand for relief under 11 U.S.C. § 523(a)(15);

IT IS FURTHER ORDERED that the defendant's motion for summary judgment is denied in all other respects.

ENTER:

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE